IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

PAT TUBERVILLE
Plaintiff

V. NO. 3:95CV150-B-A

PERSONAL FINANCE CORPORATION,
BANK OF MISSISSIPPI, AND ROY BATTS
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the defendants' motion for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The plaintiff was hired in 1986 by the defendant Personal Finance Corporation (hereinafter "PFC") to be the manager of PFC's office in Grenada, Mississippi. The plaintiff performed well and increased the loan production in the Grenada office until 1990, at which time the loan volume peaked at just over $1 million. From that time on, however, plaintiff's productivity decreased. She began to receive a steady stream of written warnings and criticisms from her superiors. Although the plaintiff would show improvement at times, the improvement never lasted for very long. Some of the written memorandums from her superiors described the plaintiff as being an "on again-off again" type of manager.

In May of 1993, the plaintiff was demoted to assistant manager. PFC hired Richard Smith in July of 1993 to replace the plaintiff as manager. Even with the change in leadership, production in the Grenada office remained unsatisfactory.

On July 1, 1994, the defendant Roy Batts, director of supervisors for PFC, and Jackie Ayers, vice president of PFC, visited the Grenada office to visit with Smith and the plaintiff. During this visit, Batts informed Smith and the plaintiff that they had ninety days in which to turn the office around or else they would either be replaced or the office closed down entirely. Batts memorialized his warning in writing.

Several days after Batts' visit, the plaintiff met with her gynecologist for her annual examination. In 1989, the plaintiff's doctor had told the plaintiff that she would eventually need a hysterectomy to correct some pain that she was experiencing. After meeting with her doctor in July of 1994, the plaintiff decided to proceed with the surgery. The hysterectomy was scheduled for September 14, 1994. On August 23, 1994, the plaintiff submitted, pursuant to the Family Medical Leave Act, a request for six to eight weeks of leave to begin on September 13, 1994. Attached to the request was a note from her doctor confirming the need for the leave.

On September 1, 1994, Batts again visited the Grenada office to meet with Smith and the plaintiff. During this meeting, Batts

informed Smith and the plaintiff that sixty days of the ninety had expired and that a decision would be made the last day of the month. Batts further explained that while some improvement had been made, the overall production of the office remained far below satisfactory. Again, Batts confirmed the nature of his visit in writing.

Several days later, with the plaintiff's leave almost upon them, the defendants decided that they needed to make a decision regarding the Grenada office. Since the office had not made satisfactory improvement, and since the plaintiff would be on leave the final two weeks of the month and unable to assist in turning the office around, the defendants decided to proceed with discharging both Smith and the plaintiff. Although the terminations were officially effective September 30th, both Smith and the plaintiff were dismissed from their duties on September 12, 1994. While Smith received severance pay only through September 30th, the plaintiff received three weeks of sick leave pay followed by an additional six weeks of severance pay. Furthermore, all of the plaintiff's medical bills related to her surgery were covered under the plaintiff's company health insurance.

Six and a half weeks after surgery, the plaintiff was released by her doctor to return to work. On December 17, 1994, she gained employment with Waste Management in Grenada. According to the plaintiff, she had to be placed on tranquilizers by her doctor due

to the emotional distress of being terminated by the defendant. She continued on tranquilizers until she was hired by Waste Management.

The plaintiff filed suit against the defendants alleging that the defendants violated her rights under the Family Medical Leave Act, 29 U.S.C. §§ 2601 et seq. The plaintiff further asserts various state law causes of action, including violation of contractual status, bad faith, intentional infliction of emotional distress and negligent infliction of emotional distress. By letter dated April 24, 1996, the plaintiff withdrew her claim for violation of Article 7, Section 191 of the Mississippi Constitution.[1]

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions,

[1] The plaintiff has also submitted a copy of an unsigned, stipulated notice of dismissal regarding her claim for violation of the Mississippi Constitution. When the parties sign the stipulation of dismissal, the plaintiff will submit the original to the court for filing.

answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

A. Family Medical Leave Act Claims

The Family Medical Leave Act (hereinafter "the Act") provides in pertinent part as follows:

> Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> ...
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1). "Serious health condition" is defined as:

> ...an illness, injury, impairment, or physical or mental condition that involves--
>
> (A) inpatient care in a hospital, hospice, or residential medical care facility; or
>
> (B) continuing treatment by a health care provider.

29 U.S.C. § 2611(11).

To present a prima facie case under the Act, the plaintiff must offer evidence that she was treated less favorably than an employee who had not requested leave, or that the adverse employment decision was made because of her request for leave. See Oswalt v. Sara Lee Corp., 889 F. Supp. 253, 259 (N.D. Miss. 1995), aff'd, 74 F.3d 91 (5th Cir. 1996). The plaintiff has failed to offer evidence of either one. The evidence is undisputed that the plaintiff was treated at least as well as, if not better than, Richard Smith, who was terminated on the same date as the plaintiff. Smith received only two weeks of severance pay, whereas the plaintiff was paid for an additional nine weeks--two weeks longer than her doctor held her out of work.[2]

---

[2] The plaintiff has filed an affidavit in which she testifies that Batts made the following statement to her during his visit on September 1, 1994: "I don't give a damn if you are on medical leave. I'll fire your ass, too." The plaintiff has presented this affidavit in support of her claims for negligent and intentional infliction of emotional distress. Even if offered as evidence for the plaintiff's claims under the Act, the court finds that this statement is insufficient to maintain a prima facie case for a violation of the Act. The overwhelming weight of the evidence indicates that the plaintiff was not denied any benefits under the Act, and that her discharge was clearly imminent, absent a major change in the Grenada office, before she made her request for leave.

The plaintiff argues that the defendants have admitted that the timing of the leave was a major factor used in making the termination decision. However, the overwhelming weight of the evidence shows that the timing of the plaintiff's leave only affected the timing of the defendant's decision. For over three years prior to her termination, the plaintiff had received numerous written and verbal warnings regarding the deficiency in her job performance. She had been on probation at least once before, and had been demoted to assistant manager due to her poor performance. Nearly two months prior to her request for leave, the plaintiff, along with Smith, had been put on ninety-day notice regarding the need for improvement of the office. The plaintiff and Smith were both warned that failure to improve substantially would result in their termination. There is no evidence that plaintiff's request for leave had any affect on the defendant's ultimate decision to terminate the plaintiff's employment.

The plaintiff further argues that the Act provides that an employee is to be restored to her position after her leave of absence ends. 29 U.S.C. § 2614(a)(1). However, the court does not find that the restoration requirement precludes an employer from terminating an employee who has taken leave under the Act. In a case such as this, with a well-documented history of unsatisfactory performance, and where the wheels of termination were put in motion before the request for leave, the court finds that the restoration

provision should not apply. To hold that these defendants should have restored the plaintiff to her former position upon return from surgery would go far beyond the scope and intent of the Act.

The plaintiff has further alleged in her complaint that the defendant's actions were taken in retaliation for her request for leave under the Act. However, the evidence reflects that the plaintiff was warned of her impending termination nearly two months prior to her request for leave. The plaintiff has provided no evidence which would reasonably support her claim of retaliation.

B. Pendent State Law Claims

All other claims asserted by the plaintiff are brought pursuant to state law, and therefore are not properly before this court in the absence of any viable federal claim. The district court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it had original jurisdiction. 28 U.S.C.A. § 1367(c)(3) (West 1993). For this reason, the court finds that the remainder of the plaintiff's claim should be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the court finds that the defendants' motion for summary judgment should be granted as to all claims relating to the Family Medical Leave Act. The remaining claims, brought solely pursuant to state law, should be remanded to the Circuit Court of Grenada County.

An order will issue accordingly.

THIS, the _____ day of June, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE